RECENT AMERICAN DECISIONS.

In the Superior Court of Cincinnati.—General Term, June, 1855.

THE MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY ET AL. *vs.* CHARLES DUFFIELD ET AL.[1]

1. The *legal* meaning of the term *abandonment*, as used in a policy of insurance, is a transfer to the underwriter of the interest of the assured to the extent that *interest* is *covered* by the *policy*.

2. A policy of insurance contained the following clause: "And in all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company, all their interest in and to the said steamboat, and every part, free of all claims and charges whatever.' The steamboat was assured only as to three-fourths of its value—was wrecked and abandoned to the insurance offices. Held, that the *abandonment* spoken of in the clause, and noted from the policy, could only be an abandonment in the *legal technical* sense of the word, and the owner had an interest of one-fourth in the boat after abandonment, as to which they were their own insurers.

An insurance was effected on the steamboat Sam Cloon, in four insurance companies; the agreed value of the boat being $20,000, and the amount insured in each office $3,750, or in all $15,000. The policy in each case was in the same form and with the same conditions.

The steamboat having been sunk in the Mississippi river, was by a writing executed for the purpose abandoned to the insurance companies, who by means of persons acting for them raised the boat, and realized from the wreck, after deducting charges and expenses, the sum of three thousand dollars. The present action was brought by the owners, who effected the insurance, to recover one-fourth of that sum, claiming that they all retained, after the abandonment, an interest of one-fourth in the wreck. This claim was resisted by the insurance companies, on the ground, that by the

[1] 2 Handy's Superior Court Rep. 122. We again take occasion to express our thanks to the Reporters of this volume for the early sheets.

terms and conditions of the policies, the owners were required to abandon not only to the extent of the interest insured, but all interest in the subject matter insured. The part of the policies supposed to bear on this question was as follows: "And in case of loss or misfortune, as aforesaid, it shall be the duty of the assured, their agents or assigns, to use every reasonable effort for the safeguard and recovery of the said steamboat, and every part thereof, and if recovered, to cause the same to be forthwith repaired, if practicable; and in case of neglect or refusal on the part of the insured, their agents or assigns, to adopt prompt and sufficient measures for the safeguard and recovery thereof, then said insurers are hereby authorized, and shall have the election to interpose and recover said steamboat, and cause the same to be repaired for account of the assured, to the charges of which the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value in this policy, or to consider such neglect or refusal as an abandonment, and be entitled to recover said steamboat, or any part thereof, at their own expense, and for their own use and benefit; and in no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs of said steamboat are impracticable; nor sell the wreck, or any part thereof, without the consent of this company; *and in all cases of abandonment the assured shall assign, transfer, and set over to said insurance company, all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever.*"

On the submission of the action to be tried by the court at special term, a judgment was rendered in favor of the insured for one-fourth of the sum realized from the wreck. To reverse this judgment, a petition in error was filed by the insurance companies.

The opinion of the court was delivered by

GHOLSON, J.—The principle and foundation of all insurance is indemnity. The contract of insurance cannot be made a cover for gambling. It was at one time supposed in England, that *valued*

policies as they are called, were invalid, as falling under the prohibition against *wager policies*. But they were sustained as an estimate, by agreement of the parties, of the value of the subject matter of insurance. In the absence of fraud, in case of a total loss, the estimate of value so made must stand, but an average loss opens the policy. *Shawe* vs. *Felton*, 2 East, 109; 7 Mass. 369; 7 Ohio, 1, pt. 284.

In an open policy, if a loss happen, the value of the subject matter of insurance is fixed by reference to the time of the insurance, as in case of a vessel, at the time of the commencement of the voyage. And the only difference seems to be, that what in one case would be matter of proof, is in the other matter of agreement. 2 East, 109, 117; 7 Mass. 369.

Now, an insurance may be to the extent of a full indemnity, or for a partial indemnity; and to the extent that there is no indemnity, the owner of the subject matter of insurance has been said to be his own insurer.

So an indemnity to a certain extent may be obtained by a contract with A.; to a certain other extent with B., and so on; and still these several contracts may not provide for a full indemnity; to a certain extent the owner may be uninsured.

In an ordinary case where there is a partial loss, there takes place what is termed an adjustment; "and the rate of the loss being ascertained, the insurer is liable in the proportion which the sum insured bears to the actual value of the property included in the risk described in the policy." 7 Mass. 374; 2 J. C. 36. The effect of this rule is, as has been stated, to make the owner of the property insured contribute to his own loss in proportion as any part of its value may be uninsured. To secure a full indemnity, he must insure to the full value of the property. This rule of contribution does not apply under a policy against fire. 6 Pick. 186.

Where there has been in fact a partial loss, but the insured has made *an abandonment* to several insurers, and has been paid the amount of the indemnity for which he contracted, the same not extending to the whole value of the subject matter insured, is the adjustment made on the same principle? Is the owner considered

in this case, as in the other, in the light of an insurer? or does he renounce this right by the abandonment?

It is expressly stated in the elementary books, "that the abandonment cannot transfer the interest of the assured any further than that interest is covered by the policy." Arnould, 1159. This is in accordance with the rule laid down in 5 Peters, 622.

Indeed, the general proposition on this subject was not controverted in the argument, but the right of the assured to contribution in the case stated was admitted; at least it was admitted that such was the doctrine in all the recent elementary works on insurance."[1]

Admitting that after an abandonment to insurers, the amount of whose policies does not cover the value of the subject matter insured, the owner would be entitled to his proportion of what might be saved, it is claimed that this right is cut off by a clause in the

[1] Although the general doctrine was not controverted in this case, yet in a case probably on a policy similar to the one on which the present controversy arose, the court in Kentucky appears to have arrived at a different conclusion, and to have placed its decision on the ground that the general doctrine was different from that admitted in this case, as having been laid down in the elementary books. In the case of Cincinnati Insurance Company *vs.* Bakewell, 4 B. Monroe, 541, 544, it is said:

The claim of Farrow to a rateable interest in the net proceeds of the sale, proportioned to the uninsured part of the boat's agreed value in the policies, as it could only be made in that shape, on the ground that the abandonment was effectual, so it is, in our opinion, precluded by the same fact, upon the principle that an abandonment, legally made, puts the underwriters completely in the place of the assured, and operates in effect a transfer of property; Chesapeake Insurance Company *vs.* Stark, 6 Cranch, 272; Col. Insurance Company *vs.* Ashby, &c., 4 Peters' S. C. Rep. 144, &c., &c. And on this principle, with regard to which we have seen no contrariety of opinion or authority, the claim was rejected by the Chancellor. We may add, without deciding that such a claim would not, under any circumstances, be admissible, that as it is optional with the insured, even when he has the undoubted right of abandonment, either to retain the property and seek his indemnity in what may be saved by himself, and in his remedy, if he has one, for a partial loss, or by abandoning the property to secure a recovery for a total loss, leaving to the underwriter the chance of indemnity by saving what he can, at his own risk and expense, there is at least no equity in allowing the insured, after such abandonment, to come in for any share of what may be saved, while the underwriter is not indemnified."

policies in this case. Indeed, that is the only question made by the counsel for the parties in their argument, and we have referred to the principles before adverted to, only for the proper understanding of that question, and in aid of a true construction of the policies, on which a correct decision must depend.

The legal effect of an abandonment—the meaning of that term is now well understood by all who are conversant in matters of insurance. When, therefore, we find the term used in a policy of insurance, we are bound to suppose that the parties have used it in its legal sense. In that sense, it certainly does not mean simply an abandonment of the vessel; for an *abandonment* may be effectually made by an insured, who at the same time retains possession of the vessel, or goods abandoned, and sells or disposes of the same. Indeed, it is his duty to do so, unless the abandonment be accepted. And we need not say, that an abandonment may be effectual without any acceptance. So a vessel, when in a position which might well justify *an abandonment*, in its technical sense, as understood in the law of insurance, may be ever so completely abandoned in a literary sense; and yet such an act has nothing to do, and is in no manner connected, with an abandonment in a technical sense.

An abandonment, as that term is understood when applied to contracts of insurance, means the yielding up or surrendering to the insurer by the insured of the interest in the property covered by the insurance. It is usually done by the owner of the property when informed of the peril or loss. He gives to the insurer notice of an abandonment. The effect of an abandonment is to place the insurer, in reference to the interest covered by the policy, in the place of the insured. Some of the expressions used on this subject in the books, are very strong, and might well lead to the idea that the abandonment extended to the whole interest owned, and not merely that insured. 4 *B. Monroe*, 544.

When an insurer elects to claim a total loss, as he may in some cases where it is not so in fact, "as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he

receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realizing or increasing that value." *Roux* vs. *Salvador*, 3 Bingh. N. C. 266; 32 E. C. L. 110–120.

"The abandonment, where properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy." *Patapsco Ins. Co.* vs. *Southgate*, 5 Pet. 604, 622.

With this understanding of the legal meaning of the term "abandoment," we proceed to examine the clause in the policies which are claimed to extend the effect and operation of an abandonment beyond the limit before established by law. The clause taken singly is as follows: "In all cases of abandonment, the assured shall assign, transfer, and set over to said Insurance Company all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever." Was it the intention, by the introduction into the policy, of this clause, to give to an abandonment an effect by agreement which it did not have by law?

In the case just cited from 5 Peters, it is said: "There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems, however, agreed that no particular form is necessary, nor is it indispensable that it should be in writing. But in whatever mode or form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title and interest in the subject insured." In view of the remarks in the extract just quoted, it does not seem improbable that the framer of the policies under consideration, which for the most part, and especially as to the clause under consideration, are printed forms for general use, may have intended to guard against the difficulty of considering any doubtful or equivocal acts an abandonment, by a requisition that there should be a direct transfer and assignment of the interest, which should properly be yielded up or ceded by the insured to the insurer on claiming a total loss. And the clause may also have

been intended to insure a transfer or assignment of the interest free from the claims or charges of other persons.

If the term "abandonment" in the first part of the clause was used in its legal signification, as understood in the law of insurance, then, as before stated, it means a cession of the interest covered by the policy; and to say that in all cases of such a cession there shall be a transfer or assignment of all interest in the subject matter insured, free of all claims and charges whatever, can only properly refer to the form or mode in which the cession is to be effectuated, and not to its extent, that being fully shown by the use of the term "abandonment." If the construction claimed for the plaintiffs in error be correct, then the term "abandonment" cannot have been used in its proper legal sense, and the clause should have read: "in all cases of a claim for a total loss the assured shall assign, transfer, and set over (*i. e.* abandon, cede, by assignment or transfer) all their interest," &c. The abandonment or cession is consequent upon the claim for a total loss and necessary to make that claim effectual, as explained in the case of *Roux* vs. *Salvador*, before cited. It may be, if the intent otherwise required, that we would be justified in giving to the term "abandonment" the sense just indicated; but, as the latter part of the clause may have a proper meaning, without extending the operation and effect of an abandonment beyond that ascribed to it by law, and the other conditions and clauses of the policy do not require, but rather forbid such a construction, and it would in our judgment be attended, in several respects, with inconvenient results, we do not feel that it is a proper case for inferring that words were used in other than their proper legal sense.

It is not reasonable to suppose that the framer of the policies, had he intended so important a change in the operation and effect of an abandonment, as to make it include not only the interest covered by the policy, but all the interest of the insured in the subject matter of insurance, would have left that intention a matter of doubtful inference, or would have failed to express it in clear and apt language. A change of this description in policies of insurance should be unambiguous. It might in very many cases preclude the

insured from claiming a total loss, and would almost invariably create a difficulty where insurances had been effected in different offices, and they were unwilling to act together, for the insured could only abandon to one, and as that might be considered a sale or disposition of the wreck, which is prohibited by the policy, it might be doubtful whether he could recover from the others, even for a partial loss. But it is not necessary to enter more minutely into the inconveniences which might result from such a construction, as we are satisfied that upon the language used, the construction given by the Court at Special Term, resulting in a recovery by the insured, may be maintained. The judgment will, therefore, be affirmed.

Bates & Scarborough, Coffin & Mitchell, for plaintiffs in error.

Nixon, for defendants.

In the Supreme Court of Pennsylvania, 1854—*In Equity.*

THE WESTERN SAVING FUND SOCIETY OF PHILADELPHIA ET AL. *vs.* THE CITY OF PHILADELPHIA ET AL.[1]

1. By the original ordinance for the construction and management of the gas works of the old city of Philadelphia, the city was authorized, if it should deem expedient, to take possession of the works, and to convert the stock thereby created into a redeemable loan. The works in the meantime were to be controlled and managed in all respects by a board of trustees appointed by the City Councils. Additional stock was created by subsequent ordinances, with the same reservation of right to the city. In June, 1841, the city exercised this right, and certificates of loan were issued to the former stockholders. On June 14, 1841, an ordinance was passed authorizing a further loan for the extension of the works, by which the works were pledged for the payment of principal and interest of "*all* loans made for or on account of said gas works;" the faith of the city was pledged that the price of gas should not be reduced so as to reduce the clear profits below 8 per cent. a year; and it was expressly stipulated that the gas works and the funds thereof should be wholly controlled and managed by a board of trustees elected

[1] The following case, like several other important decisions of the last few years, has been omitted, from some incomprehensible reason, from the reports of the period. We regret that our space will not permit us to publish it in as complete a form as we could desire.

and constituted as theretofore, and who were to pay no part of the said funds into the City Treasury, until all the principal and interest of said loans should be fully paid. Loans were taken under the provisions of subsequent ordinances. In 1854, after the passage of the Act to consolidate the city of Philadelphia, which provided for the creation of a department of gas, an ordinance was introduced and passed by the Common Council of the new city, which in effect took the whole control and management of the gas works and their funds from the trustees, and placed it in the hands of an officer to be styled Chief Engineer of the Gas Works, who was to be at the head of that department. In consequence of this action, the loanholders filed a bill to prevent the city from intermeddling or interfering with the trustees, or from attempting to invalidate the trust. *Held*, that the ordinance of 1841 created a contract between the city and the loanholders, present and future, which it was incompetent to invalidate, either by removing the property of the works from the trustees, or by altering the price of gas so as to lower the profits of the works below eight per cent.

2. A city, in the supply of gas to its citizens, acts as a private corporation, and is subject to the same duties, liabilities, and disabilities. It cannot impair the obligation of a contract entered into by it in that capacity, because it may deem it for the benefit of its citizens so to do.

Bill for an injunction and other relief.

The Common Council of the consolidated city of Philadelphia, on the 29th August, 1854, passed an ordinance in relation to the Philadelphia Gas Works, the provisions of which, material to the present case, are as follows:

SEC. 1. *The Select and Common Councils of the city of Philadelphia do ordain*, That the Select and Common Councils shall, on the passage hereof, and annually thereafter in the month of September, and whenever a vacancy shall occur by death, resignation or otherwise, elect by viva voce vote, in joint meeting, a Chief Engineer of Gas Works. He shall hold his office until his successor be chosen at the annual time fixed therefor, unless sooner removed by a resolution of Councils.

SEC. 3. He shall be the head of the department of the Gas Works. As such he shall take charge of the works and machinery owned by the said corporation and used for the manufacture and distribution of gas; and superintend all matters pertaining to their construction, repair and management, and to the manufacture and

distribution of gas. He shall employ all labor necessary for such management, and purchase or contract for the supply of materials to be used in the construction and repair of the works and the manufacture and distribution of gas. But no contract or engagement for labor or materials, or any extension or enlargement of the works, or their appurtenances, shall be made unless authorized by Councils, and an appropriation made therefor; and no contract or engagement shall be entered into until the same be submitted to the Committee on the Gas Works, for inspection. He shall be charged with the collection of the gas rents, and all claims for the sale of the products of the gas works.

SEC. 4. He shall define and regulate the duties of all the officers of this department, but in such manner as not to interfere with any duties herein imposed upon any such officer; and cause such accounts to be kept as shall exhibit the financial condition of the department.

SEC. 8. All moneys due for the sales of gas and the other products of the works, shall be collected by such officers of the department as the Chief Engineer may designate, and such places as he may appoint, under his control and as his agents; the amounts so collected shall be reported daily by the Chief Engineer, agent or agents, under oath or affirmation, upon his responsibility, to the City Controller, and immediately after such report he shall pay the same to the City Treasurer.

SEC. 13. All ordinances of the corporation of the Mayor, Aldermen and Citizens of Philadelphia, which provide for the management of the Philadelphia Gas Works, and are inconsistent herewith or are supplied hereby, be and the same are hereby repealed.

The gas works had been previously owned by the city, but placed under the control and management of trustees, by ordinance, and under circumstances sufficiently set forth and detailed in the opinion below. They were also pledged for a number of successive loans, amounting together to a large sum. One of the objects of the proposed ordinance of 1854, was supposed to be to procure a reduction in the price of gas. Several of the loanholders, apprehensive of the

security of their investments, united with the trustees in a bill to restrain the action of the city.

Gerhard and *Meredith*, for complainants.
Hazlehurst, for the city.

The opinion of the court was delivered by

LEWIS, C. J.—This is a motion for a special injunction to restrain "the City of Philadelphia" from interfering or intermeddling with the trustees of the Philadelphia Gas Works, and from any attempt to invalidate the trust, or the security in the hands of the said trustees for the holders of the loans made for the construction and extension of the works, or to seize or take possession of the works, revenues or profits." The works were originally constructed by means of funds raised by subscriptions to stock made by private individuals in pursuance of an ordinance passed on the 21st March, 1835. By the terms of that ordinance the works were the private property of the stockholders, and their only source of re-embursement was the profits. The city was not liable for anything beyond the application of the money paid into the city treasury by the stockholders. By that ordinance, which formed the contract between the city and the stockholders, the works were to be under the management of *twelve* trustees, to be chosen by the Select and Common Councils. The terms of office of the trustees were so arranged that one-third of their number would go out every year, and their places were to be supplied by the annual election of *two* trustees by the Select, and the same number by the Common Council. By the same ordinance the city had the right, if at any time the Select and Common Councils might deem it expedient, to take possession of the works and convert the stock into a loan, redeemable in twenty years from the date of conversion, bearing an interest of six per cent. per annum, payable-half yearly on the first days of February and August. Under this arrangement, the money was raised, the trustees were appointed, and the works constructed. By subsequent ordinances, assented to by the stockholders, the works were from time to time extended, and loans made for the purpose of defraying the charges.

But on the 14th January, 1841, an ordinance was passed containing many provisions so beneficial to the city, and, at the same time so disadvantageous to the stockholders, that there was good reason to apprehend that the latter would not consent to them. To meet that contingency it was provided in the ordinance that if the stockholders did not consent to the terms proposed before the 25th of February, 1841, the mayor, aldermen and citizens of Philadelphia should, on the 1st of March, 1841, take possession of the works in their own right, and the stock should be converted into a loan in the manner provided by the original ordinance of association—the works to remain under the direction of and superintendence of the trustees, until otherwise provided for. The ordinance of the 14th January, 1841, was not accepted; and the city, in pursuance of an ordinance of the 3d June, 1841, issued certificates of loan to the several stockholders. This ordinance contained a section by which the trustees were required to set apart and reserve, out of the moneys received by them from the manufacture and sale of gas, eight per cent. per annum on the amount of the loan thus authorized to be applied, in the first place, to the payment of the interest accruing thereon, and the balance to the sinking fund. This brings us to the Ordinance of the 17th June, 1841. By that ordinance a further loan of $125,000 was authorized for the purpose of extending the works. The city was to borrow the money in such sums as might be required by the trustees. The certificates of loan were to be transferable at the office of the Philadelphia Gas Works. The rate of interest was to be fixed by the trustees. It was to be payable semi-annually at the Gas Works. The faith of the city, the sinking fund and the buildings, apparatus, pipes, fixtures, and the income and profits of the said gas works, were expressly pledged for the punctual payment of the interest, and for the ultimate reimbursement of the principal of all the loans made for or on account of said gas works, as the same shall become due; and, in order that provision may be made for the same, the said trustees were authorized and required to set apart all the clear net profits that may remain after paying the interest on the said several loans, to constitute a sinking fund, which, with the interest thereon, was to

be invested in loans, and kept separate from the other funds of the said works. And "for the further security of the loanholders of said works, the faith of the city was expressly pledged, that the price of gas should not at any time be reduced so as to reduce the clear profits below eight per cent per annum on the whole amount of the cost of said works until all the loans contracted for, or that may hereafter be contracted for, shall be paid." And for the further security of the said loan holders, it was expressly "stipulated that the works shall be controlled and managed by a board of trustees elected and constituted as heretofore, who shall have the whole control and management of the said works and of the said sinking fund, and of all the other funds belonging to the said works, and the said trustees shall pay no part of said funds, nor any part of the profit of said works into the city treasury, but shall apply and appropriate the same as is directed by this ordinance, until the interest and principal of the said loans shall be fully paid as they become due to the said loanholders." In pursuance of this ordinance, and of the faith of the pledges contained in it, the sum of $125,000 was obtained on certificates issued by the city, in each of which it was particularly set forth that it was "issued in pursuance of an ordinance of the 17th June, 1841." This made the provisions of that ordinance, so far as they related to the rights of the parties, as much a part of the contract as if they had been set forth at length in each certificate of loan. But the pledges in regard to the price of gas were made expressly "for the further security" of all the loans contracted or that might thereafter be contracted. And the stipulations in regard to the control of the works, and the duty of the trustees to appropriate the profits of them, were also expressly made for the same loanholders.

In none of the ordinances subsequently passed is there any provision for the repeal of any part of the ordinance of the 17th June, 1841, or any attempt made to place the new loans upon a footing different from those previously made under that ordinance. On the contrary the certificates to be issued from time to time were, in each ordinance authorizing them, directed to be *in like form* and *transferable in like manner* with the certificates of the other loans authorized

for the purpose of said gas works;" and in each ordinance authorizing a new loan, the trustees were directed to set apart out of the profits of the works, ten per cent. per annum on the amount borrowed, for the purpose of paying the interest thereon and for reimbursing the principal, &c. "A subsequent statute is never to be construed to repeal a prior one, unless there be a contrariety in them, or at least some notice taken of the former act, so as to indicate an intention to repeal it." "The law does not favor a repeal by implication, unless the repugnance be quite plain." Dwarris on Statutes, 674. "To repeal an express enactment by implication requires a strong and clear inconsistency." *Street* vs. *The Commonwealth*, 6 W. & S. 212. We see no such inconsistency, nor any evidence of an intention to repeal the stipulations in favor of all subsequent loan-holders for the extension of the gas works. Such a repeal would have been an act of injustice and bad faith to the original stock-holders, whose money had constructed the works, and who had accepted certificates of loan in pursuance of the ordinance of the 3d of June, 1841, which contained a provision that ten per cent. per annum on the amount of that loan should be set apart for the purpose of paying it out of the moneys received from the manufacture and sale of gas.

The repeal would likewise be an act of gross impolicy on the part of the city, because the only effect of it would have been to leave the works under a mortgage for the loans already contracted, in pursuance of the ordinance of 17th June, 1841, while a question seriously affecting the credit of the loans would have arisen, respecting the power of the city to pledge them as a security, on which further loans for the extension of the works might be raised. The ordinance of 17th June, 1841, was, therefore, very judiciously permitted to remain in full force when the various subsequent loans were made. It designated the security which was pledged, and prescribed the remedy for making that security available. It placed the pledged property and funds in the hands of trustees, to be selected in such a manner as to secure the confidence of capitalists who advanced their money. It is a rule in the construction of contracts, that the law existing when a contract is made enters into it,

and necessarily forms a part of it. The remedies prescribed for enforcing performance, are regarded by the parties as constituting that "obligation" of the contract, which is within the protection of the constitution. If the remedies were taken away, there would be nothing but the moral obligation left, and it is absurd to suppose that this was the "obligation of the contract," which the legislature was prohibited from impairing. Plain common sense, responding to the demands of justice, has scattered to the winds the flimsy distinction between the right and the remedy, so far as to declare that any change of the nature or extent of the latter so as to impair the former, is just as much a violation of the compact as if the right itself was directly destroyed. *Bronson* vs. *Kinzie, et al.* 1 How. 316. "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation." *Green* vs. *Biddle*, 8 Wheaton, 1. A contract of mortgage vests an interest; and its main incident is a right to have the land applied in discharge of the debt, either in the way prescribed by the law when the contract was made, or in some form of remedy substantially equal. *Gantly's Lessee* vs. *Ewing*, 3 How. 707.

These principles have been applied to govern the contracts and control the acts of States, clothed with all the powers and prerogatives of sovereignty. We see no reason why a municipal corporation, which may be created and destroyed by the State at pleasure, should stand upon higher or better footing than its own creator. Like a State, it has its public duties and its private rights. It has no right to enter into a contract which interferes with its duties to preserve the health and morals of the city. It may therefore defeat the title of its own grantee when it becomes necessary to do so in order to abate a nuisance or preserve the public health. The *Presbyterian Church* vs. *City of New York*, 5 Hill, 540, and *Stuyvesant* vs. *The Mayor of*

New York, 6 Hill, 603, are instances of the exercise of this right; and it rests upon the ground that a corporation, acting for the benefit of others, has no power to enter into a contract which would prevent it from performing its public duties. Every right derived from it is holden subject to the restriction that it shall be so exercised as not to injure others. Upon this principle, if the gas works should become a nuisance, affecting the health and comfort of the neighborhood, the city councils, notwithstanding their own lease of the ground, would have the right to direct the removal of the works to a place where they would be less injurious to the public. The Master of the Rolls, in speaking of the East India Company, admitted that it had rights as a sovereign power, but declared that it had also duties as an individual; and notwithstanding its claim to the right of violating its contract, as an incident to its character as a sovereign power, it was held to be bound by its contracts as a private company. *Moodalay* vs. *Morton*, 1 Br. Ch. Cas. 471.

The restriction upon the power of a municipal corporation to enter into contracts, which may prevent it from performing its duty to the public, is nothing more than the application of the familiar principle which avoids the contracts of individuals when they are detrimental to the public rights. But the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses, relate to the "things of commerce" as distinguished in the civil law from the "things public," which are regulated by the sovereign. Such contracts are not made by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well settled distinction, and the pro-

cess of separation is not rendered impossible by the *confusion*. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons where the like special franchise had been conferred. These principles are well enforced by Chief Justice Nelson, in delivering the opinion of the Supreme Court of New York, in the case of *Bailey* vs. *The City of New York*, 3 Hill, 538. In that case the acts of the city had relation to the construction of water works. In this they have relation to gas works. But the principle is precisely the same in both cases.

By the contract with the loanholders, the city has placed the works and their income in the hands of trustees as a security for the loans. The loans subsequent to that act were contracted on the faith of that pledge. The city has no more right to disturb the security than a mortgager would have to demand a re-conveyance without payment of the mortgage debt. To say that the city does not *mean* to disturb the security, is nothing to the purpose. The contract designates the manner in which the trustees are to be appointed. By that system they are placed on a permanent footing, and are effectually guarded against the changes and consequent mismanagement which might flow from the impulsive action of political parties. This arrangement was a very material consideration with those who advanced their money on the faith of it, and the city has no right to change the trustees in any other mode than that prescribed by the compact. A debtor who has made an assignment for the benefit of his creditors has no right to reclaim the property assigned, without payment of his debts; nor has he any right to substitute himself as a trustee for his creditors against their will. This is the rule even in the case of voluntary assignments; but it applies with much greater force to assignments or pledges of property to secure the payment of debts contracted on the faith of them.

The act of 2d February, 1854, gives the city no new rights whatever over these works. It merely transfers to the corporation as enlarged, the rights which the same corporation possessed before the enlargement of its boundaries; and the rights thus transferred are subject to the "trusts, limitations and conditions," which existed before. As owner of the works, subject to the paramount rights of the loanholders, the city may inspect the books, accounts and papers relating to them, and demand an accurate account of the proceedings of the trustees. If she has reason to believe that they are mismanaging the trust to such an extent that her own power of removal, as regulated by the contract, would be an inadequate remedy, she may, like other *cestui que trusts*, apply to the courts of justice for redress. If she thinks that by a more economical management than tha theretofore practiced the price of gas might be reduced without violating the provisions of the contract with the loanholders, she may file a bill for an account and ask for the directions of the court on the question. In the mean time she has no power to withdraw any portion of the income of the works from the trust fund. She has no better right to do it indirectly by withholding the payment of any just debt she may owe for gas, than she has to accomplish the same object by a direct seizure of the works and their revenues. These rights and duties may very appropriately be assigned to the "*gas department*," authorized by section fifty of the Consolidation Act. Whatever powers may be exercised over the gas works of the other incorporated districts now included within the city limits, it is clear that none exists over those in question in this case, except in subordination to the rights of the loanholders as defined by the ordinance of 17th June, 1841. If those rights have been subsequently modified by consent, such modification furnishes no ground for any further deviation from original contract without consent.

The exigency of the case calls for nothing more at present than an injunction to restrain the city of Philadelphia from attempting to take possession of the gas works described in the bill, or to interfere with the trustees therein named, in their control and manage-

ment of the said works, and the incomes and other funds belonging to the same, until the further order of this court. Let an injunction for that purpose issue upon filing a bond with security in twenty thousand dollars, pursuant to the statute in such case provided.

Court of Errors and Appeals of New Jersey.—March Term, 1852.

BENJAMIN S. MULFORD, APPELLANT, *and* JONATHAN BOWEN AND OTHERS, RESPONDENTS.[1]

1. The rule that an executor, administrator, guardian, or trustee, cannot directly or indirectly become a purchaser at his own sale, is firmly established.
2. It is uniformly held in courts of equity, that the trustee will not be permitted to derive benefit from a purchase thus made, but that the deed will be avoided at the instance of the *cestui que trust*.
3. It has been held in this State, not only that the deed may be avoided in equity, but that as against the *cestui que trust* it will be treated as *void* in a court of law. The rule at law, however, is not that the deed is *absolutely void;* the extent of the doctrine is that the *cestui que trust* may avail himself of the objection at law.
4. Admitting the doctrine of the courts of law in its fullest extent, the trustee, in case the deed be avoided, may be entitled to equitable relief. And the equities subsisting between the trustee and *cestui que trust* cannot depend upon the tribunal in which relief is sought. The equities of the trustee cannot be defeated by the *cestui que trust* resorting to law rather than equity, for relief.
5. Where the cause was retained for the purpose of final relief in equity, and nothing could be gained by permitting the party to proceed with his action at law, the injunction was continued.

On the twentieth of February, eighteen hundred and thirty-seven, the appellant and John S. Mulford, administrators of Mason Mulford, deceased, made sale of part of the real estate of their intestate, for the payment of the debts of the estate, by virtue of an

[1] 1 Stockton's N. J. R. 797. Reported in the court below, 4 Halst. Ch. 751.

order of the Orphans' court of the county of Cumberland. At the vendue, the land was struck off to one Isaac Mulford, he being the highest bidder, for the sum of eighteen hundred dollars. On the first of March, eighteen hundred and thirty-seven, a deed was made by the administrators, pursuant to the sale, to Isaac Mulford. On the same day and for the same consideration, he re-conveyed the land to the complainant.

At the July term, eighteen hundred and forty-seven, two of the heirs at law of Mason Mulford, the intestate, instituted an action of ejectment against the complainant for the recovery of their share of the real estate thus sold and conveyed. The complainant thereupon filed his bill in equity against the plaintiffs in the action of ejectment, praying that they might be restrained by injunction from further proceeding at law, and be decreed to confirm the title of the complainant to the said real estate; or if the chancellor should be of opinion that the title of the complainant was voidable in equity, that they might come to an equitable account; that the complainant might have a lien upon the real estate for the amount of the purchase money and of all permanent improvements made by him upon real estate, over and above the rents and profits.

An injunction issued pursuant to the prayer of the bill. Upon the hearing, the injunction was dissolved, but the bill was retained, no final decree having been made upon the merits. From the order of the chancellor, dissolving the injunction, the complainant appealed.

The opinion of the court was delivered by

GREEN, C. J.—The well settled rule in equity, that an executor, administrator, guardian, or trustee, cannot directly or indirectly become a purchaser at his own sale, has not been called in question. The rule is firmly established. It rests upon clear principles. It is dictated by obvious considerations of policy. It is essential to guard at once the trustee from temptation, and the *cestui que trust* from the consequences of fraud and injustice. It is uniformly held in courts of equity that the trustee will not be permitted to derive benefit from a purchase thus made, but that the deed will be avoided at the instance of the *cestui que trusts*. In this State it has been

held not only that the deed may be avoided in equity, but that as against the *cestui que trust* it will be treated as *void* in a court of law. The doctrine obtains not only where the trustee has been guilty of actual fraud, but also in cases of construction or equitable fraud resulting from the mere purchase by the trustee of the estate of the *cestui que trust*, without regard to the *bona fides* or *mala fides* of the transaction.

It was earnestly insisted upon in argument, on the part of the appellant, that the rule at law, as adopted in this State, is inconsistent, not only with the practice of courts of law elsewhere, but with sound principle. If it were so, it would not be in accordance with the practice of a court of equity, in administering relief, to proceed upon the ground that a legal principle, long established in courts of law, was erroneous; nor could such a conclusion be of any avail to the appellant in this cause. He seeks relief in equity upon the very ground that at law his deed will be avoided. This constitutes in fact the equity of his bill. Without it his relief would be complete at law, and he would have no standing in a court of equity. This bill must necessarily be dismissed.

Nor is it designed to intimate an opinion, that sitting even as a court of common law this court would be disposed to unsettle the rule that a deed made by an executor or trustee directly or indirectly to himself, may be avoided at law as well as in equity. No inconvenience has arisen, nor is it perceived that any will necessarily result from the practice. Sound policy requires that not the slightest encouragement should be given to the practice of trustees dealing in the estates of their *cestui que trusts*.

The rule at law, however, is not that the deed is absolutely void. Such expressions have no doubt been used by courts, but clearly without regard to critical accuracy. The extent of the doctrine is, that the *cestui que trust* may avail himself of the objection at law, and is not necessarily driven to equity for relief. The deed is not absolutely void. It is good unless the *cestui que trust* elect to avoid it.

Admitting the doctrine of the courts of law in its fullest extent, the trustee, in case the deed be avoided, may be entitled to equi-

table relief. It is true that a court of law cannot adjust equities and administer relief upon equitable principles, but for that very reason the doors of a court of equity ought not to be barred against him. Courts of law never have decided that the trustee should lose the land and the purchase money also; that the *cestui que trust* should recover the land and retain the price paid for it. They have simply avoided the purchase, and left the parties to resort to equity for relief; any other doctrine would convert a rule designed for the suppression of fraud into an instrument of fraud. In case, then, the *cestui que trusts* attempt at law to recover the estate purchased by the trustee, he may come into equity for relief. Whether he be or be not entitled to relief, will necessarily depend upon the character and circumstances of the transaction.

Nor is the relief sought by the complainant obnoxious to the objection urged by the respondent that a court of equity will never relieve a party against his own fraudulent act. The complainant is not seeking to avoid his contract, or asking to be protected against its consequences. The *cestui que trusts* seek in a court of law to avoid the contract, and recover the premises conveyed to the trustee. He asks that they may be restrained from recovering the possession of the premises, until they repay the money actually advanced, and the equities between them be adjusted. In other words, he asks the relief to which he would clearly have been entitled had the *cestui que trusts* sought to avoid the deed in equity, and not at law. Nothing can be clearer than that the equities subsisting between the trustee and the *cestui que trust* cannot depend upon the tribunal in which relief is sought, and that the equity of the trustee should not be defeated by the *cestui que trusts* resorting to law rather than equity for relief. Though a court of law be incompetent to administer relief, the arm of a court of equity is not thereby shortened.

If the cause is retained for the purpose of final relief in equity, nothing can be gained by permitting the party to proceed with the action at law. The question of actual fraud cannot be tried in that suit. The jury will be instructed, in case it appear that the administrator was a purchaser at his own sale, whether he be guilty of

actual fraud or not, that their verdict must be for the plaintiff. The proper mode of taking the verdict of a jury upon the question of actual fraud, if that be desirable, would be by an issue at law. The injunction, therefore should be continued till the cause is finally settled in equity.

No opinion can now with propriety be expressed upon the merits of the case. The appeal is solely from that part of the decree dissolving the injunction. From the residue of the decree there is no appeal. Indeed the merits of the case do not appear to have been at all considered—certainly not decided upon by the chancellor. This court, therefore, cannot decide upon them.

The necessary parties, moreover, are not before the court, to warrant a final decree. Only two of the heirs are made parties to the bill.

The order dissolving the injunction must be reversed, the injunction continued till the further order of the court, and the cause remitted to the court of chancery to be proceeded in according to the rules and practice of that court.

Decree accordingly.

Court of Errors and Appeals of New Jersey.—June Term, 1852.

THE EXECUTORS OF JOHN P. QUICK, APPELLANTS, *and* ELIZABETH FISHER ET AL., RESPONDENTS.[1]

1. As a general principle, a trustee has no power to change the character of the trust fund; and if he assume the power of converting real estate into personal, or personal into real, he acts at his peril.
2. If a change in the character of the fund be deemed necessary, or for the interest of the beneficiary, it should be made only with the permission and by the sanction of a court of equity.
3. The rule applies not only to executors, administrators, guardians of infants and lunatics, and other trustees specially constituted by law, but to all trustees having charge of the property of others.

[1] Stockton's Rep. 802. The case in Chancery is reported in 4 Halst. 674; and on appeal, 4 Halst. 778.

3. And if a loss has been sustained, from the trustee exceeding his authority by an unauthorized and illegal disposition of the trust funds in his hands, he is liable for the loss.

The opinion of the court was delivered by

GREEN, C. J.—Peter Prall, by his last will and testament, gave and bequeathed the one-fourth part of the residue of his personal estate to his son-in-law, John P. Quick, in trust, nevertheless, for the use, benefit, and support of his grand-daughter, Mary Fisher, to be paid to her, the said Mary Fisher, by the said John P. Quick, as her necessities may require. Prior to the first of May, 1830, John P. Quick, the trustee, received the trust funds so bequeathed to him, amounting to two thousand one hundred eighty-six dollars. Of this sum, eighty-six dollars appears to have been paid to the *cestui que trust*, as it was received on the first of May, 1830. The balance of the fund, two thousand one hundred dollars, was invested in the purchase of real estate, by reason of which a large part of the trust fund is alleged to have been lost. On the sixth of February, 1835, Mary Fisher, the *cestui que trust*, died, leaving six children. After the death of Mary Fisher, the real estate was sold and the trustee prepared an account of the trust fund, exhibiting the loss alleged to have been sustained by the investment. In accordance with this statement, a settlement was made by the trustee with four of the children of Mary Fisher; their respective shares of the alleged balance was paid to them, and their receipt taken for the amount so paid respectively. On the twenty-ninth day of December, 1845, the trustee died, the complainants, two of the children of the said Mary Fisher, then being under twenty-one years of age.

The bill is filed by two of the children of Mary Fisher, who were under age at the death of John P. Quick, the trustee, to recover against his executors their share of the trust fund.

It is admitted that the defendants are bound to *account*. The only question is upon what principle the account should be stated. The trust fund consisted of money which was invested by the trustee in the purchase of real estate. The complainants claim the full amount of the fund with interest, deducting only such payments as

have been made to the beneficiary, or for her benefit. The defendants claim an allowance for losses sustained by reason of the investment of the fund in real estate.

I deem it clear, both from the answer and from the evidence, that the trust fund was in point of fact invested in the purchase of real estate. There is no reason to doubt that the investment was made in good faith for the benefit of the beneficiary. She was the daughter of the trustee. She was the wife of a man incapable or indisposed to maintain his family. She was, moreover, the mother of a family of dependent children. The father may well have supposed, under such circumstances, that a fund specially designed for the benefit and support of his daughter would be best invested in providing a home for her and for her children. The investment was made (if not at the instance of the daughter herself) certainly at the solicitation of her husband and of his friends. The trustee had no personal interest in making the investment, nor so far as it appears, did he derive the least pecuniary advantage from it. On the contrary, he added to the trust fund a considerable amount of his own money in order to make the purchase and put the property in repair. The beneficiary and her children were put in possession immediately on the completion of the purchase, and they were permitted to continue in the possession and enjoyment of the property so long as the husband of the beneficiary was able to carry on his business, and immediately upon the death of the *cestui que trust* the property was sold at a sacrifice. He took the deed for the property, it is true, in his own name and not as trustee, but this he may have done either because he supposed, as appears by the evidence, that he had himself an eventual interest in the trust fund, or because a part of his own property was invested in the purchase, or because he supposed he might thus most effectually control the property as well for the interest of the beneficiary as for his own. I see nothing in the transaction to impugn in the least degree the character of the trustee for *integrity*, however much he may have erred in judgment or in the estimate of his legal rights. It appears, moreover, that every dollar of the trust fund received by the trustee prior to the determination to purchase the real estate was paid

over as soon as received to the beneficiary, and that the whole balance of the fund, with a large sum of the trustee's individual property, was invested in the purchase of the real estate of which, as has already been said, the beneficiary and her family for years enjoyed the entire benefit. I deem this statement due in justice to the memory of the trustee, and especially as the account which was prepared by him years after the death of his daughter, has received, and perhaps justly admits of, a harsh interpretation, affecting, to say the least, the liberality of the accountant. In considering the case, it may be fairly assumed not only that in point of fact the trust money was invested in the purchase of real estate, but that the investment was made in good faith and from justifiable motives. The question remains, had the trustee the right to make such investment of the trust fund? And if he had not, then in equity, must the loss be borne by his estate or by the trust fund?

It is admitted as a general principle, that the trustee has no power to change the character of the trust fund, and that if he assume the power of converting real estate into personal, or personal into real, he acts at his peril.

While he will be suffered to derive no benefit from such change of investment, he will be held personally accountable for any loss which may ensue. While the beneficiary will be permitted, if it appear for his interest to follow the fund, through whatever changes it may pass, the trustee will not be permitted to compel the beneficiary to accept the property after the conversion, or to impose any loss which may result from the conversion upon the trust fund.

If a change in the character of the fund be deemed necessary, or for the interest of the beneficiary, it should be made only with the permission and by the sanction of a court of equity. The rule applies not only to executors, administrators, guardians of infants and lunatics, and other trustees specially constituted by law, but to all bare trustees, having charge of the property of others, and not specially invested with peculiar or extraordinary powers. Experience has shown that the rule is a wise and salutary one. The security of the fund is a primary consideration in the investment of the trust estate. The temptations to a trustee to tamper with a trust fund

are so numerous and so powerful, the hopes of bettering the estate so often prove delusive, that the power of changing the character of the fund is most safely reposed in the discretion of judicial tribunals.

Nor is the rule prohibiting the change of character of the trust fund founded solely or mainly upon the consideration that the inheritance or succession to the estate is thereby affected. On the contrary, it is a well settled rule in equity, that the character of the fund will be converted from personal to real or from real to personal without regard to the succession whenever the interests of the beneficiary require it. *Matter of Salisbury*, 3 J. C. R., 347.

The trustee, if the principle be correctly stated, has in this case exceeded his authority. The loss has been sustained not by an error of judgment committed by the trustee in the management of the trust fund, but by an illegal and unauthorized disposition of the trust funds in his hands. He is consequently liable for the loss.

It cannot be objected that these complainants have slumbered over their rights, or that they designedly forebore to prosecute their claim till after the death of the trustee. They were both infants at the death of the trustee, and consequently were not chargeable with laches. Nor can it be objected that they have in any wise assented to the illegal disposition of trust fund, or ratified directly or indirectly the act of the trustee. Whatever force there may be in these objections as applied to the other children of Mary Fisher, it does not apply to these complainants.

As to the objection that the husband of Mary Fisher, as her administrator, and not her children, is entitled to this fund, and that therefore the children are in no contingency entitled to recover, it is enough to answer, if there be anything in the objection, that it is not a ground of appeal in the present case, and that the objection may be raised upon the final hearing in equity.

The decree should be affirmed.